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4 UNITED STATES BANKRUPTCY COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 In re

7 FITNESS WIZE,

No. 02-1178

8 Debtor(s).
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10 JEFFRY G. LOCKE, Trustee,

11 Plaintiff(s),

12 v.

A.P. No. 02-1216

13 PHILIP NIEMAN,

14 Defendant(s).
15 _____/

16 Memorandum of Decision After Trial
17 _____

18 Defendant Philip Nieman is an investment banker and insider of the debtor. On December 14,
19 2001, he received a payment from the debtor of \$75,000.00 on account of an unsecured loan he had made
20 to the debtor. A little less than five months later, the debtor ceased operating its business. It filed its
21 Chapter 7 petition on July 23, 2002. Since the payment allowed Nieman to receive more than he would
22 have recovered if the payment had not been made and he received distribution pursuant to the
23 Bankruptcy Code, the trustee, plaintiff Jeffry Locke, seeks to avoid the payment as a preference.

24 Nieman concedes that he was an insider and that he received the payment within the year prior to
25 bankruptcy. However, he argues that the debtor was solvent when he received the payment.

26 The debtor's schedules show that it had over \$1.4 million in debt when it filed its Chapter 7

1 petition, and only \$351,000.00 in assets. The evidence established that the debtor's assets and debts
2 were substantially the same seven months prior, when Nieman had been paid; some assets were higher
3 and some debt was higher, but the net liquidation value of the debtor's assets had been about \$1 million
4 less than its debts for all of the period from December, 2001 to July, 2002.

5 Relying on *In re DAK Industries, Inc.*, 170 F.3d 1197 (9th Cir. 1999), Nieman argues that the
6 debtor must be valued as a going concern and that it was solvent in December, 2001. However, the *DAK*
7 case is readily distinguishable. In *DAK*, independent expert testimony had established to the bankruptcy
8 judge's satisfaction that the debtor was solvent using a going concern valuation; of crucial importance
9 was the fact that the debtor had continued to be actively in business for more than 30 months after the
10 alleged preferences had been made. The Court of Appeals affirmed, holding that the bankruptcy court
11 had properly used a "going concern" valuation and had properly determined, using that valuation, that the
12 debtor had been solvent when the payments were made.

13 Unlike the debtor in *DAK*, which survived for two and a half years as a going concern, the debtor
14 in this case closed its doors 140 days after Nieman received his payment. Nieman introduced no
15 independent testimony as to the going concern value of the debtor when he was paid.

16 Most tellingly, the Trustee introduced into evidence a very lengthy email which Nieman had sent
17 to the debtor's CEO on December 26, 2001, less than two weeks after the payment in question. The
18 email documented in detail exhaustive meetings they had attended December 18 and 19. In that email,
19 Nieman had noted:

20 You, [the CFO] and I met for many, many hours, and the three of us
21 talked about alternatives ranging from a bankruptcy filing, to a going
dark scenario, to a corporate downsizing.

22 Nieman's counsel took the court's interest in this email as being caused by the mention of bankruptcy,
23 but that is not why the court considers it important. The relevant factor is not what the email says but
24 what it does not say. Although the parties had met for many hours and explored every possible course of
25 action, and although Nieman had meticulously documented and summarized the substance of the
26 meetings, there is no indication that the parties had explored obvious avenues if the business had a net

1 worth at that time such as selling the business as a going concern or bringing in new investors. It seems
2 likely, given Nieman's degree of sophistication, that he would have at least mentioned these possibilities
3 if he truly believed the debtor was solvent at the time. His failure to mention them leaves the court with
4 the belief that the debtor's business had no going concern value at the time and was in fact "on its
5 deathbed." To the extent the business had any going concern value at all, the court does not believe
6 Nieman's testimony that it exceed the corporation's debts.

7 For the foregoing reasons, the court concludes that it is more likely than not that the debtor was
8 insolvent in December, 2001. The Trustee shall accordingly have judgment against Nieman in the
9 amount of \$75,000.00, plus interest at the rate of 5% from the date of the complaint. The Trustee shall
10 also recover his costs of suit.

11 This memorandum constitutes the court's findings and conclusions pursuant to FRCP 52(a) and
12 FRBP 7052. Counsel for the Trustee shall submit an appropriate form of judgment forthwith.

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15 Dated: June 30, 2003

16 Alan Jaroslovsky
17 U.S. Bankruptcy Judge
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